Filed 3/27/19 J.H. Boyd Enterprises, Inc. v. Boyd CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

J.H. BOYD ENTERPRISES, INC.,

Plaintiff, Cross-defendant and Respondent,

v.

KENNETH ROBERT BOYD, Individually and as Trustee, etc., et al.,

Defendants, Cross-complainants and Appellants.

F074903

(Super. Ct. No. 15CECG00915)

ORDER MODIFYING OPINION AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the nonpublished opinion filed on March 6, 2019, be modified as follows:

At the end of the first paragraph on page 19, after the sentence ending "defects in the motion," add as footnote 8 the following footnote:

> **8** Appellants argue for the first time in their reply brief that after concluding JHBE failed to meet its burden to disprove the five affirmative defenses, "the trial court should have permitted trial at least on those issues," so appellants "would have been able to establish JHBE's unjust enrichment by its refusal to adhere to the Option after receiving the benefit of the early sale of J.H.'s property ahead of appellants' property, and the further benefit of Ken's waiver of his real estate commission for that sale." Citing the theories of unjust enrichment and promissory estoppel,

> appellants argue the trial court should have denied summary judgment so they could pursue unjust enrichment damages. "Consistent with well-established authority, absent justification for failing to present an argument earlier, we will not consider an issue raised for the first time in a reply brief. [Citations.] Moreover, it does not appear that this argument was raised in the trial court. It cannot be raised for the first time on appeal." (*Save the Sunset Strip Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1181, fn. 3.) "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant." (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 [declining to consider an argument raised for the first time in a reply brief].) As appellants failed to raise this issue in both the trial court and their opening brief, and have not shown good cause for failing to assert it earlier, we do not consider the argument.

Except for the modification set forth above, the opinion previously filed remains unchanged.

This modification does not effect a change in the judgment.

Appellants' petition for rehearing filed on March 21, 2019, is denied.

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DE SANTOS, J.

WE CONCUR:

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PEÑA, Acting P.J.

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SMITH, J.

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KENNETH ROBERT BOYD, Individually and as Trustee, etc., et al.,

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(Super. Ct. No. 15CECG00915)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Ferguson Case Orr Paterson, Wendy C. Lascher and Joshua S. Hopstone; Law Offices of Joseph H. Boyd and Joseph H. Boyd for Defendants, Cross-complainants, and Appellants.

McCormick, Barstow, Sheppard, Wayte & Carruth, Timothy J. Buchanan, Timothy L. Thompson, and Scott M. Reddie for Plaintiff, Cross-defendant and Respondent.

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J.H. Boyd Enterprises, Inc. (JHBE) successfully sought summary judgment against Kenneth Robert Boyd (Ken) and Susan K. Boyd (Susan), as trustees of The Boyd Trust dated December 23, 1999 (the Boyd Trust) (collectively, appellants),[1] on its claim that appellants breached a $2.5 million written promissory note, which was secured by a deed of trust on a parcel of real property Ken owned. The trial court entered judgment in favor of JHBE for foreclosure of the deed of trust and a deficiency judgment against Ken and Susan, both as trustees and individually, to the extent the sales proceeds were insufficient to pay the outstanding debt.

Appellants seek reversal, asserting the trial court improperly applied the parol evidence rule to bar a purported oral agreement between Ken and his father, Joseph Haig Boyd (J.H.), who originally held the note as trustee of the Joseph Haig Boyd Trust (JHB Trust), that Ken could extend the note's due date until the real property was sold or developed. Appellants also contend the trial court erred by depriving them of the opportunity to assert their affirmative defenses and miscalculated the amount owed on the debt. As respondents concede the amount owed on the debt was miscalculated, we reverse that portion of the judgment and remand for the trial court to amend the judgment to reflect the correct amount. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ken began working with his father, J.H., in 1967, and they became business partners in 1971. J.H. taught Ken the real estate business and together they sold homes, made loans, built subdivisions and created a strong family business. Many of the homes in Kerman were built and sold by Ken and J.H. According to Ken, rarely were all terms of an agreement between them reduced to writing. Rather, their honest and transparent working relationship allowed them to trust each other's word. In 1991, J.H. retired from

[1] Appellants also include Ken and Susan in their individual capacities.

his real estate business and opened a separate office for his corporation, JHBE, an entity he used to manage his personal investments and properties.

In 2003, Ken began developing Cobblestone Creek, a five-phase subdivision in Kerman. The project was part of Ken's larger plan to pay off personal debts, solidify his financial future, establish an estate plan for his children and prepare for retirement. After the first two phases were nearly completed, another developer approached Ken and asked to purchase the remaining three phases sequentially, with escrows closing on each phase over time. The most valuable phase was "Phase 5"—a 20-acre parcel on Modoc Avenue (the Modoc property), which Ken expected to sell for nearly $5 million.

J.H., as trustee of the JHB Trust, owned a 17-acre parcel on California Avenue (the California property) across the street from Ken's project. Ken discussed with J.H. the possibility of selling the California property to the developer. Ken approached the developer, who did not know Ken's father owned the California property, and offered to include the California property in the sale. The developer agreed to purchase the California property for approximately $3.5 million. Ken and J.H. then decided to place the escrow on the California property between the escrow on Phases 4 and 5 of the Cobblestone Creek development, so escrow would close in this order: (1) Phase 3; (2) Phase 4; (3) the California property; and (4) Phase 5—the Modoc property.

According to Ken, he and J.H. then made two agreements. The first was for JHB Trust to lend $2.5 million to the Boyd Trust, whose trustees are Ken and his wife Susan. The loan was memorialized in a promissory note issued on February 15, 2007, executed by Ken and Susan as trustees for the Boyd Trust in favor of the JHB Trust, by which they agreed to pay the $2.5 million at six percent interest "[o]n or before September 1, 2009."[2]

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[2] The note is entitled "Note Secured By Deed of Trust" and provides: "On or before September 1, 2009 after date [*sic*], for value received, I promise to pay to Joseph Haig Boyd, as Trustee of The Joseph Haig Boyd Living Trust dated May 30, 1991, or order [*sic*], at 275 So. Madera Ave., Suite 402, Kerman CA 93630 the sum of Two Million Five Hundred Thousand and 00/100 Dollars, with interest from the date loan funds are

The note was secured by a deed of trust on the Modoc property. Ken used the loan to pay off business loans, fund some business ventures and do estate planning. Ken claimed that he and J.H. intended the note to be paid long before its due date from the proceeds of the Modoc property sale.

The second agreement was an oral "option agreement" that allowed the Boyd Trust to extend the note's due date "as often as reasonably necessary to effectuate the sale of the 20-Acre Modoc Property" (the oral agreement). Consideration for the oral agreement consisted of the agreement to have the escrow on the California property close before the escrow for the Modoc property, thereby possibly jeopardizing the sale of the Modoc property, and Ken's waiver of his approximately $210,000 commission for facilitating the sale of the California property.

In 2008, after escrow closed on the California property, the developer was forced to withdraw from the agreement to purchase the Modoc property. On June 11, 2008, J.H., on the JHB Trust's behalf, and Ken, on the Boyd Trust's behalf, executed an

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disbursed, until paid at the rate of 6.00% (six) per cent per annum, payable with Principal payment. [¶] Interest shall be compounded annually on the first day of each March. [¶] See Exhibit 'A' attached hereto and by reference incorporated herein for Clauses which apply to the Note. [¶] Should default be made in payment of Principal or Interest, the whole sum of Principal and Interest shall, at the option of the holder of this Note, become immediately due. Principal and Interest payable in lawful money of the United States. If action be instituted on this Note, the undersigned promises(s) to pay such sum as the Court may adjudge as attorney's fees. This Note is secured by a Deed of Trust to Chicago Title Company, a California corporation." Exhibit A contains four clauses: (1) a "penalty" clause providing that if an installment is not paid by its due date, the Boyd Trust agrees to "pay a delinquency charge of 6% of the total amount of delinquency for each month, or fraction thereof, in which any delinquency exists"; (2) an "alienation" clause providing that if the Boyd Trust sells or conveys the property, all notes and obligations secured by the note are immediately due and payable at the option of the JHB Trust; (3) an "interest" clause providing that if interest is not paid, "it shall bear like interest as the unpaid principal provided, however, that the interest so compounded, shall not exceed the highest rate allowed by law"; and (4) an "attorney" clause that awards attorney fees to JHB Trust if it is required to employ an attorney to enforce its rights under the terms of the note or deed of trust.

amendment to the note extending the due date to September 1, 2011 (the 2008 amendment). The 2008 amendment states: "The final due date shall be extended to September 1, 2011. [¶] All other terms, covenants and conditions of said Contract shall remain unchanged, binding and in full force."

Over the next few years, the real estate market in California and the rest of the country plummeted and the building of new subdivisions came to a standstill. In Kerman, the value of open land for subdivision dropped by more than two-thirds of pre-crash prices. On December 20, 2010, J.H. and Ken executed a "Modification Agreement," which extended the deadline for the Boyd Trust to pay the note to September 15, 2014 (the 2010 modification). Under the 2010 modification, the Boyd Trust agreed to make a $175,000 principal and interest payment on September 15 of each year until 2014, at which time the entire unpaid balance of the note would be due.[3] The 2010 modification contains a "history of the loan" and states the unpaid balance on the note as of September 15, 2011, would be $2,572,361.27. According to Ken, in executing the 2010 modification, J.H. reiterated that Ken could have as much time as he needed to develop or sell the Modoc property to pay off the note, and if the market had not recovered by the new due date, the Boyd Trust could get another extension pursuant to the oral agreement.

The Boyd Trust made its first $175,000 payment on the note on August 24, 2011. In July 2012, Martha Marsh, J.H.'s daughter, acting as trustee of the JHB Trust, assigned the note to JHBE. Thereafter, the Boyd Trust made payments of $175,000 to JHBE in September 2012 and September 2013.

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3 This provision of the 2010 modification states in full: "The Principal and Interest payments shall be changed as follows: Beginning September 15, 2011, a Principal and Interest payment [of] $175,000.00 shall be made and continue on the 15th day of each September until 2014 on which date the unpaid balance of Principal with unpaid Interest due thereon shall be due and payable in full."

By 2014, the real estate market had not sufficiently recovered to either sell or subdivide the Modoc property. Ken attempted to sell another property to pay off the note, but the deal fell through in August 2014. In addition, Ken underwent quadruple bypass heart surgery. Ken notified JHBE of these events and sent JHBE a letter in which he stated that because the sale of his ranch fell out of escrow and would not close, "I will not be in a position to pay off the loan at this time." Ken asked "for an extension of time, or if you would like to make other types of arrangements, I am open to your suggestions." At the time, J.H. was no longer running JHBE due to his health and advanced age. Instead, Martha was the president and chairman of the board of directors; she controlled the corporation with her husband, Robert Marsh, and sister, Louise Autenrieb. JHBE responded to Ken's request by stating it would "consider a short-term extension" if specific conditions were met. Ken had a difficult time negotiating an extension due to his health. On September 17, 2014, before he had an opportunity to discuss the terms of an extension, JHBE notified him that he was in default on the note and demanded payment in full. Subsequent negotiations were unsuccessful. J.H. passed away in March 2015.

This Lawsuit

In March 2015, JHBE sued Ken and Susan, individually and as trustees of the Boyd Trust, to enforce the note. In the operative first amended complaint, JHBE alleged causes of action for breach of the note and judicial foreclosure. Ken and Susan, individually and as trustees of the Boyd Trust, subsequently filed a cross-complaint against JHBE, Martha, Louise, Robert, and Louise's husband, Fredrick Autenrieb. Ken and Susan alleged that when the note and deed of trust were executed, J.H. orally agreed with Ken that the Boyd Trust "had the option to extend the deadline of the Note as often as Ken Boyd felt was reasonably necessary." Ken and Susan also filed an answer to the first amended complaint, in which they alleged 19 affirmative defenses.

During the discovery phase of the case, Ken, who had been a licensed real estate broker since 1969, was questioned about the oral agreement in his deposition. When asked why he did not make the balloon payment that was due on September 15, 2014, Ken answered "[b]ecause I had an agreement with my father that he would extend the note on my needs." Ken testified he made the oral agreement with J.H. before he executed the note and deed of trust, but he admitted the written agreements did not mention the oral agreement. Ken believed he was legally obligated to pay the $2.5 million plus accrued interest when "I sell my 20 acres." When asked if he believed he would never be obligated to pay the debt if he chose never to sell the 20 acres, Ken responded: "I've never thought that I would never sell it. I can't answer yes or no to that. My intentions are to either sell it or develop it, one of the two. And in both cases, selling or development, I would pay it off." Ken admitted no writing existed that confirmed the oral agreement or substantiated his belief, and since repayment was not due until he sold the 20 acres, it could be 20 or even 100 years before the loan was due. When asked if his testimony was that he did not have to repay the $2.5 million loan until the 20-acre property was sold, Ken responded, "Sold or developed." He and his father, however, did not have any discussions about what type of development would trigger the obligation to pay the note.

The Summary Judgment Motion

JHBE moved for summary judgment or, in the alternative, summary adjudication. As pertinent here, JHBE argued it was entitled to judgment on its claims for breach of the note and judicial foreclosure because the Boyd Trust did not pay the note when due and the purported collateral oral agreement was unenforceable under the parol evidence rule. JHBE also argued in a footnote that because several affirmative defenses asserted by appellants were based on the alleged oral agreement, it was entitled to summary adjudication of those defenses.[4]

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4 JHBE sought summary adjudication of the following affirmative defenses: (1) the second affirmative defense—failure of conditions; (2) the ninth affirmative defense—modification of contract; (3) the tenth affirmative defense—JHBE's breach; (4) the

In opposing the motion, appellants argued summary judgment of the claim for breach of the note was not warranted because the Boyd Trust's performance was excused by JHBE's breach of the note and JHBE failed to negate the affirmative defense of promissory estoppel. Appellants also argued the oral agreement, which they called an "option contract," created a triable issue of fact and did not violate the parol evidence rule. Appellants asserted that JHBE was not entitled to judicial foreclosure because there were triable issues of fact on whether the Boyd Trust had defaulted on the note and JHBE failed to address the issue of promissory estoppel.

Following oral argument, the trial court issued an "Order After Hearing" in which it granted summary judgment of the first amended complaint in favor of JHBE and against Ken and Susan as trustees for the Boyd Trust. The court, however, denied summary judgment as to Ken and Susan individually since the note was between the Boyd Trust and JHB Trust.

The court found JHBE prevailed on the claim for breach of the note, as JHBE established the Boyd Trust breached the note and the only defense raised, namely, the alleged "oral extension agreement," was barred by the parol evidence rule. In so finding, the court considered appellants' evidence surrounding the making of the oral agreement, but concluded the note was an integrated contract that could not be modified by parol evidence as (1) the note appeared to be a complete written agreement; (2) the oral agreement is inconsistent with the note, the 2008 amendment, and the 2010 modification, because it contradicts the specific payment deadlines set forth in these written agreements; and (3) the oral agreement would naturally be part of the written agreements. In light of this conclusion, the court found in JHBE's favor on its claim for judicial foreclosure, determined the amount owed under the note as of October 4, 2016, was

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fifteenth affirmative defense—waiver; and (5) the sixteenth affirmative defense—discharge of obligations.

$3,438,270.50, and decreed that judicial foreclosure of the property could proceed. The court denied summary adjudication of the affirmative defenses because (1) JHBE's memorandum of points and authorities did not discuss them, and (2) JHBE did not present any evidence the affirmative defenses were based solely on the alleged oral extension agreement.

The "Order for Judgment for Foreclosure of Real Property, Etc.," entered on October 31, 2016, stated the trial court found there was no triable issue of fact with respect to the first cause of action for breach of the note and fourth cause of action for judicial foreclosure; the only defense the Boyd Trust raised was based on the alleged oral agreement ostensibly permitting appellants to extend the time for payment on the note, but the agreement was irrelevant and inadmissible under the parol evidence rule; the court had determined the value of the debt the Boyd Trust owed is $3,438,270.50, with legal interest at the rate of 10 percent per annum; and because the Boyd Trust is an inter vivos living trust, liability on the judgment against the trust extends to Ken and Susan in their individual capacities if a deficiency judgment exists after the real property security has been exhausted. The judgment directs foreclosure of the Modoc property, and provides that JHBE shall have a deficiency judgment against Ken and Susan in the amount of the debt reduced by the fair value of the property after the foreclosure sale, as determined by the court at a fair value hearing. Appellants filed a notice of appeal on December 1, 2016.

DISCUSSION

I. Standard of Review

Summary judgment is proper only if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (c), (f).)[5] As the moving party, JHBE had the initial burden to show it was entitled

[5] Undesignated statutory references are to the Code of Civil Procedure.

to judgment. (§ 437c, subd. (p)(1).) This burden did not include disproving appellants' affirmative defenses. Instead, a plaintiff such as JHBE satisfies its burden of showing there is no defense to a cause of action by proving each element of the cause of action. (*Ibid.*; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) Once JHBE met its initial burden, the burden shifted to appellants to produce admissible evidence showing a triable issue of fact as to the cause of action or a defense thereto. (§ 437c, subd. (p)(1).)

We review the trial court's ruling on a summary judgment motion de novo and independently determine whether the moving party is entitled to judgment as a matter of law. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.) We consider all the evidence set forth in the moving and opposing papers, except that as to which objections have been made and sustained. (§ 437c, subd. (c).) We liberally construe the evidence in favor of the party opposing summary judgment and resolve all doubts concerning the evidence in favor of that party. (*Hampton v. County of San Diego*, *supra*, at p. 347.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.)

II. Breach of the Promissory Note

The primary issue in this case is: What is the contract? The written note originally provided for payment of principal and interest in full as of a specified due date—September 1, 2009. In June 2008, the "final due date" was extended to September 1, 2011. Finally, in December 2010, the principal and interest payments were changed—the Boyd Trust now was required to make annual payments of $175,000 beginning September 15, 2011, until September 15, 2014, "on which date the unpaid balance of Principal with unpaid Interest due thereon shall be due and payable in full." Appellants contend the note also includes an oral agreement between Ken and J.H., which gave Ken the option to extend the note's repayment deadline until the Modoc property could be subdivided and sold. If the oral agreement is part of the note, then appellants cannot be in breach of it. Otherwise, appellants are in breach of the note and summary judgment properly was entered on JHBE's claims for breach of the promissory note and judicial foreclosure.

Whether the oral agreement may be considered part of the note depends on the extent to which the note is an integrated writing. We conclude the note is integrated at least on the issue of the repayment deadline and therefore the oral agreement is not part of the note.

The parol evidence rule, codified in section 1856 and Civil Code section 1625, "provides that when parties enter an integrated written agreement, extrinsic evidence may not be relied upon to alter or add to the terms of the writing." (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174 (*Riverisland*).)[6] "An integration may be partial rather than complete: The parties may intend that a writing finally and completely express only certain terms of their agreement rather than the agreement in its entirety. [Citation.] If the agreement is partially integrated, the parol evidence rule applies to the integrated part." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 953 (*Founding Members*); see *Masterson v. Sine* (1968) 68 Cal.2d 222, 225 (*Masterson*).)

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6 Section 1856, subdivision (a) provides: "Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement." Civil Code section 1625 provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

To determine whether a written agreement is integrated, courts consider (1) the language and completeness of the written agreement, and whether it contains an integration clause; (2) the terms of the alleged oral agreement and whether they contradict those in the writing; (3) whether the oral agreement might naturally be made as a separate agreement; and (4) the circumstances surrounding the transaction and its subject matter, nature and object. (*McLain v. Great American Ins. Companies* (1989) 208 Cal.App.3d 1476, 1484.) While an integration clause may be relevant to a court's determination whether an agreement is integrated, the presence or absence of such a clause is not conclusive. (See *Masterson, supra,* 68 Cal.2d at pp. 225-226; see also Rest.2d Contracts, § 209, com. b., p. 115 ["No particular form is required for an integrated agreement. Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive."]; *id.*, § 216, com. e., p. 140 [a merger clause "does not control the question whether the writing was assented to as an integrated agreement"].) In addition, the collateral agreement will be examined only to the extent it does not directly contradict an express term of the written agreement, as " 'it cannot reasonably be presumed that the parties intended to integrate two directly contradictory terms in the same agreement.' " (*Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1386.)

Whether the parol evidence rule applies is a "mixed question of fact and law" suitable for resolution on summary judgment when "what happened" is not in dispute. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 390-392; see *Haggard v. Kimberly Quality Care, Inc.* (1995) 39 Cal.App.4th 508, 517 ["Whether the agreement is an integration is thus a question of law for the court."]; cf. § 1856, subd. (d) ["The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to the terms included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement."].)

When the evidence of integration is not in dispute, whether a contract is integrated is a question of law. (*Founding Members, supra,* 109 Cal.App.4th at p. 954.)

Here, while there is no integration clause, the note and the amendments to it are complete regarding the due date for payment. The oral agreement, which allegedly arose from conversations that occurred before the note was executed, was not in the note, the 2008 amendment or the 2010 modification. Ken and J.H. had three opportunities to include any oral agreement in the written documents had they intended those conversations to constitute binding agreements. (See *Salyer Grain & Milling Co. v. Henson* (1970) 13 Cal.App.3d 493, 501 [noting the parties had two opportunities to include alleged oral agreements, which arose from conversations that predated the original written agreement and written extension agreement, had they intended those conversations to constitute binding agreements].)

In addition, an oral agreement that permits Ken to unilaterally extend and control the note's due date if the Modoc property has not sold is directly contrary to the written provisions of the note and its amendments. First, it changes the note's due date from an expressly stated date to an unknown date—when the Modoc property is sold or developed which, according to Ken, could take as long as 100 years. It also is inconsistent with the term of the note that gives the note's holder discretion to declare the note immediately due and payable upon default. For example, under the note, as amended by the 2010 modification, had the Boyd Trust failed to make one of the $175,000 payments, the JHB Trust had the discretion to declare the entire principal and interest immediately due without regard to whether the Modoc property had been sold. Finally, if the note were due when the Modoc property sold, there would be no need for an "alienation" provision, which gives the note's holder the option of declaring the note immediately due and payable "irrespective of the maturity dates expressed therein" if the trustor sells, conveys or alienates the Modoc property.

Moreover, an oral agreement that Ken could extend the due date until the Modoc property was sold or developed would not " '*naturally* be made as a separate agreement.' " (*Masterson, supra,* 68 Cal.2d at p. 227.) As JHBE points out, it would not be natural to have a separate oral agreement that impacts and contradicts the most important part of the note, namely, the due date. If Ken had such an oral binding agreement with J.H., the note or the amendments would have stated the loan was due and payable when the Modoc property was sold or developed.

The parties' contract is the note, as amended, which required the payment of the unpaid balance of principal and interest by a specified date, namely, September 15, 2014, when the unpaid balance became immediately due and payable. As to such a writing, the claimed oral agreement that Ken could extend the due date until the Modoc property was sold or developed must be deemed inconsistent and therefore barred by the parol evidence rule.

Appellants contend the parol evidence rule should not apply, or at least there is a triable issue of material fact as to its application, because either (1) the oral agreement is an option contract, (2) the oral agreement modified the note, or (3) the principles of promissory estoppel apply.

Appellants assert the oral agreement is a separate "option contract" that is consistent with the note, as the note contains a deadline for repayment, which was enforceable when the note was executed, while the option "is an independent, standalone agreement to extend the deadline set forth in the Note if the need arises." The oral agreement, however, is not an option contract. "An option, when supported by consideration, is a contract by which an owner gives another the exclusive right to purchase his property for a stipulated price within a specified time. [Citation.] It is a *right* acquired by contract to accept or reject a present offer within a limited time in the future." (*County of San Diego v. Miller* (1975) 13 Cal.3d 684, 688.) An option to purchase property is a unilateral agreement by which the optionor agrees to hold an offer to sell the property open for a fixed time; upon lapse of that time, the matter is completely ended and the offer withdrawn, but if the offer is accepted, a bilateral contract arises. (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 418.)

The oral agreement is not an option contract, as it does not give Ken the exclusive right to purchase J.H.'s property at a stipulated price within a specified time. Merely because Ken purportedly was given the option to extend the note's due date does not transform the oral agreement into an option contract. Instead, the oral agreement is an agreement that conflicts with the terms of a subsequent written agreement. As such, it falls within the parameters of the parol evidence rule and could not serve to alter the note's terms.

Appellants next contend there is a triable issue of fact as to whether the note was modified by the oral agreement. Appellants claim the oral agreement is "an enforceable oral modification of the contract," since the oral agreement was performed, as shown by the two extensions of the due date, and supported by consideration. Civil Code section 1698 provides that a written contract may be modified by an oral agreement to the extent it is "executed by the parties" (Civ. Code, § 1698, subd. (b)), or supported by consideration and the statute of frauds is satisfied (Civ. Code, § 1698, subd. (c)). But here the oral agreement predated the execution of the written note and the amendments thereto. As such, it cannot serve as a modification of the note, but rather is a prior oral agreement that was superseded by the written note and precluded by the parol evidence rule. (See *Beggerly v. Gbur* (1980) 112 Cal.App.3d 180, 188 [the parol evidence rule precludes extrinsic evidence of prior or contemporaneous agreements that contradict, vary or add to an integrated writing, but does not relate to future agreements or bar extrinsic evidence that the parties subsequently modified their integrated writing].)

Finally, appellants contend there is a "genuine question of fact … whether [the] parol evidence [rule] can be fairly employed in this case." Citing to the principles of promissory estoppel, which they asserted as a defense in their answer, appellants claim

JHBE should be estopped from contending the "Option agreement does not exist or is not enforceable." They claim that Ken relied on the "Option" to his detriment, with the understanding it was valid and enforceable, and J.H. accepted the benefits of Ken's performance, as J.H. received priority in the sale of his property and Ken agreed to forego his broker's commission.

"In California, under the doctrine of promissory estoppel, 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.' [Citations.] Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' " (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) The required elements for promissory estoppel are: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890.)

Appellants' promissory estoppel claim, premised on J.H.'s alleged oral representation that Ken could extend the due date of the note until the Modoc property is sold or developed, fails for the same reason as their claim that the oral representation is part of the note: Any promise that J.H. would extend the note's due date until the Modoc property was sold or developed was superseded by the subsequent note and its amendments, which provided a specified due date for payment. (See Civ. Code, § 1625; *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 344 [written agreement supersedes and bars from consideration prior negotiations or agreements at variance with the writing].) Moreover, estoppel cannot be used where the oral agreement contradicts the express terms of a written instrument, as it is not reasonable to rely on oral representations that contradict a written agreement. (See, e.g., *Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 318–319 [rejecting estoppel claim because reliance on representations contradicting written agreement is not reasonable].) Since any purported representation was negated and superseded by the subsequent written note, Ken cannot show reasonable reliance on J.H.'s earlier promise.[7]

The parol evidence rule is a longstanding, well-known principle that promotes fairness and predictability by encouraging parties to specify the entirety of their agreements in writing. The policy is "based on the assumption that written evidence is more accurate than human memory" and "the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts." (*Masterson*, *supra*, 68 Cal.2d at p. 227.) The parol evidence rule "is not merely a rule of evidence excluding precontractual discussions for lack of credibility or reliability. It is a rule of substantive law making the integrated written agreement of the parties their exclusive and binding contract *no matter how persuasive the evidence* of additional oral understandings. Such evidence is legally irrelevant and cannot support a judgment." (*Marani v. Jackson* (1986) 183 Cal.App.3d 695, 701.)

Here, Ken negotiated with J.H. to obtain a loan secured by the Modoc property with a specified due date, which they twice agreed to extend. If Ken wanted assurances that he could extend the due date until the Modoc property was sold or developed, he needed them in writing. Absent that, the parties' agreement consisted of the written

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[7] Appellants do not contend they were fraudulently induced to execute the subsequent written note. (See *Riverisland, supra,* 55 Cal.4th at pp. 1182-1183 [parol evidence rule does not bar evidence of fraudulent promises at variance with terms of writing]; *Julius Castle Restaurant, Inc. v. Payne* (2013) 216 Cal.App.4th 1423, 1440 [" ' "[i]t is … settled that parol evidence of fraudulent representations is admissible as an exception to the parol evidence rule to show that a contract was induced by fraud" ' "].)

terms of the note as amended. The trial court thus did not err in finding JHBE prevailed on its claims for breach of the note and judicial foreclosure.

III. Affirmative Defenses

Appellants contend that because the trial court denied JHBE's motion for summary adjudication of five of their affirmative defenses, they are entitled to a trial on those affirmative defenses. They assert that because JHBE failed to meet its initial burden of disproving theses defenses, the burden of production of evidence never shifted to them and they "never assumed an obligation to prove the affirmative defenses," which "remain viable for all intents and purposes." We disagree.

A moving plaintiff's burden of proof in seeking summary adjudication is set forth in section 437c, subdivision (p)(1): "A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved *each element of the cause of action* entitling the party to judgment on the cause of action." (Italics added.) Once the plaintiff has met its initial burden of proving the elements of its cause of action, "the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action *or a defense thereto.* The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action *or a defense thereto.*" (*Ibid.*, italics added.)

In this case, the trial court's order included findings that JHBE met its burden of proving the elements of its cause of action for breach of the note and the only defense appellants raised, namely, the oral agreement, was barred by the parol evidence rule. Those findings were sufficient to support summary adjudication of the cause of action in JHBE's favor. If appellants wanted to rely on any other affirmative defense to defeat summary adjudication of this claim, it was incumbent on them to present specific facts showing a triable issue of fact existed as to that defense.

JHBE's additional request for summary adjudication of five of appellants' affirmative defenses, which it claimed were based on the oral agreement, was simply an effort to foreclose further litigation on those issues as well, and was not a necessary aspect of obtaining summary adjudication of its cause of action for breach of the note. Moreover, in denying summary adjudication of those defenses, the trial court was careful to explain that it was doing so because of defects in JHBE's motion—the memorandum of points and authorities contained no discussion of the affirmative defenses and the separate statement did not reference any evidence to support the conclusion the affirmative defenses were based solely on the alleged oral agreement. Nowhere did the trial court state there were *triable issues of fact* which suggested that one or more of these affirmative defenses might be effective as a means of defeating the cause of action for breach of the note. And since JHBE had no obligation to defeat these affirmative defenses in order to obtain summary adjudication of its cause of action, the fact it failed to do so was no bar to the adjudication. A trial on the affirmative defenses JHBE sought adjudication of is not required simply because the trial court denied adjudication due to defects in the motion.

IV. Miscalculation of the Amount Owed

Appellants assert there were two errors with respect to the trial court's calculation that the value of the debt the Boyd Trust owed JHBE, as of October 4, 2016, is $3,438,270.50: (1) it omitted a $175,000 payment they made shortly before September 15, 2011; and (2) it included a $174,365.79 late penalty based on the note's balance which, according to the note's penalty provision, could only be imposed on a late installment. Appellants recalculate the amount owed by including the payment and deducting the late penalty, and claim the value of the debt the Boyd Trust owes JHBE, as of October 4, 2016, is actually $3,022,448.96.

JHBE concedes the judgment should be $3,022,448.96, as it agrees the $175,000 payment was not credited and also agrees to waive the late payment penalty. Accordingly, we will remand the matter for the trial court to correct the judgment.

DISPOSITION

The judgment is affirmed in part and reversed in part. Paragraph 4 of the judgment, which states that the trial court's determination of the value of the debt owed by the Boyd Trust to JHBE is $3,438,270.50, as of October 4, 2016, is reversed. The matter is remanded for the trial court to amend paragraph 4 to state the value of the debt owed is $3,022,448.96, as of October 4, 2016, with legal interest at the rate of 10 percent per annum calculated on such amount thereafter. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

DE SANTOS, J.

WE CONCUR:

PEÑA, Acting P.J.

SMITH, J.